UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RODNEY JONES, Plaintiff, v. CITY OF ATLANTIC CITY and AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO LOCAL 2303, Defendants.	HONORABLE JOSEPH E. IRENAS CIVIL ACTION NO. 07-CV-2405 (JEI) **OPINION**

APPEARANCES:

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IRENAS, Senior District Judge:

Presently before the Court is Defendant American Federation of State, County, and Municipal Employees, AFL-CIO Local 2303's

(the "Union") Motion to Dismiss in Lieu of Answer. (Docket No. 2.) Plaintiff claims that the Union breached its duty of fair representation. The Union's alleged duty arose in connection with Plaintiff's termination by Defendant City of Atlantic City (the "City") on October 18, 2006. For the reasons set forth below, the motion to dismiss will be granted because the Court lacks subject matter jurisdiction over Plaintiff's claim against the Union and declines to exercise supplemental jurisdiction.[1]

I.

Plaintiff was employed by the City's Department of Public Works as a motor broom operator in February, 2006. (Complaint ¶ 7.) Approximately eight months later, on October 18, 2006, Plaintiff received notice from the City that he was being terminated. (*Id.* ¶ 11.) The City's notice provided no explanation as to the reason for Plaintiff's termination. (*Id.*)

Plaintiff's employment was governed by a collective bargaining agreement ("CBA") between the City and the Union. (*Id.* ¶ 8.) Under the CBA, employees were required to file any grievances in writing. (*Id.* ¶ 9.) A grievance would then be presented to progressive levels of management for review and

[1] Because the Court will grant the Union's motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), it does not need to consider the Union's alternative argument that Plaintiff "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

written response. (*Id.*) Plaintiff, as a member of the Union, was "entitled to receive counsel, guidance, and representation from [the Union] from the filing of his grievance through the entire review process." (*Id.* ¶ 10.)

Pursuant to the terms of the CBA, Plaintiff filed a written grievance with the Union on October 20, 2006, as a result of his termination. (*Id.* ¶ 12.) Accompanied by his "union steward," Plaintiff also hand-delivered copies of his grievance to the Director of Public Works, Department of Human Resources, and Business Administration offices of the City. (*Id.*) Thereafter, the Union did not provide Plaintiff with any information on his grievance. (*Id.* ¶¶ 13-14.) Plaintiff called several times to inquire about its status, and was eventually instructed to contact the President of the Union directly. (*Id.* ¶ 14.) When he did, Plaintiff was informed that "the city didn't want to hear his case," and he was instructed to send a letter to an agency in Trenton, New Jersey. (*Id.* ¶ 15.)

Plaintiff sent a letter as instructed by the President of the Union, but received no response. (*Id.* ¶ 16.) In January, 2007, Plaintiff contacted the Union for the final time and was again advised that "the city didn't want to hear his case." (*Id.* ¶ 17.) Plaintiff filed a Complaint with this Court on May 22, 2007, alleging that the Union breached its duty of fair

representation.[2] The Union filed this motion to dismiss on July 19, 2007, asserting that the Court lacks subject matter jurisdiction over Plaintiff's claim against the Union and, alternatively, that Plaintiff fails to state a claim upon which relief can be granted.

II.

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) may be treated as either a facial or factual challenge to the court's subject matter jurisdiction. *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000) (citing *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)). "In reviewing a facial attack, the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *Id.* (citations omitted). "In reviewing a factual attack, the court may consider evidence outside the pleadings." *Id.* (citations omitted). The Union's present motion to dismiss is a facial challenge to the Court's subject matter jurisdiction. Therefore, the Court must accept Plaintiff's factual allegations as true. *See Petruska v. Gannon Univ.*, 462 F.3d 294, 302 n.3 (3d

[2] Plaintiff's claim against the Union is Count two of his Complaint. The remaining counts—one, three, and four—are against the City alone. The City's Motion for Summary Judgment (Docket No. 10) on these counts is currently pending before the Court.

Cir. 2006) (citing *Mortensen*, 549 F.2d at 891).

III.

The thrust of Plaintiff's Complaint is that the City terminated his employment in violation of the CBA and that the Union breached its duty of fair representation in connection with his termination and subsequent grievance. Section 301 of the Labor Management Relations Act ("LMRA") states, in pertinent part:

> Suits for violation of contracts between an *employer* and a labor organization representing *employees* in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (emphasis added).[3] Ordinarily, and as is the case here, "an employee files a claim against the union alleging breach of the duty of fair representation together with a claim against the employer alleging breach of the collective bargaining agreement in a 'hybrid' section 301/duty of fair representation

[3] Thus, this section establishes a District Court's jurisdiction over a claim against an "employer" alleging breach of a CBA. A District Court's jurisdiction over a claim that a union has breached its duty of fair representation is based on 28 U.S.C. § 1337, which provides "original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce." *See Felice v. Sever*, 985 F.2d 1221, 1226 (3d Cir. 1993) (citing *Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 83 (1989)).

suit."[4] *Felice*, 985 F.2d at 1226.

However, the Third Circuit has clearly held that a political subdivision of a state is not an "employer" under section 301 of the LMRA.[5] *See Manfredi v. Hazleton City Auth., Water Dep't*, 793 F.2d 101, 104 (3d Cir. 1986); *Crilly v. Se. Pa. Transp. Auth.*, 529 F.2d 1355, 1357 (3d Cir. 1976). Moreover, because a political subdivision is not an "employer," potential plaintiffs working for a political subdivision cannot be considered "employees," and therefore a union does not "represent[] employees" for purposes of section 301.[6] *Manfredi*, 793 F.2d at 104 (adhering to *Crilly* as precedent). Thus, the necessary conclusion is that a District Court lacks subject matter jurisdiction over a plaintiff's claims that a political

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[4] In such a suit, "the plaintiff will have to prove that the employer breached the collective bargaining agreement in order to prevail on the breach of duty of fair representation claim against the union, and vice versa." *Felice*, 985 F.2d at 1226 (citing *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 66-67 (1981) (Stewart, J., concurring in the judgment)).

[5] Section 501(3) of the LMRA, 29 U.S.C. § 142(3), incorporates by reference the definition of employer contained in section 2(2) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 152(2), which states in pertinent part: "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, *but shall not include . . . any State or political subdivision thereof . . . .*" (emphasis added).

[6] Similarly, section 501(3) of the LMRA incorporates by reference the definition of employee contained in the NLRA, which states in pertinent part: "The term 'employee' . . . shall not include any individual employed . . . by any other person who is not an employer as herein defined." 29 U.S.C. § 152(3).

subdivision of a state breached a CBA and that a union breached its duty of fair representation in connection with such a CBA. *Id.*; *Crilly*, 529 F.2d at 1362-63; *see also Felice*, 985 F.2d at 1226-27 ("We have previously held that the term 'employer' . . . excludes 'any State or political subdivision thereof,' and therefore the federal courts lack subject matter jurisdiction over a duty of fair representation claim brought by an employee of such an entity." (citations omitted)).

Here, the face of Plaintiff's Complaint makes the obvious clear—the City is a political subdivision of the State of New Jersey, and therefore is not an employer under section 301 of the LMRA. (*See* Complaint ¶ 5 (stating that "agencies and subdivisions of the State of New Jersey government are named defendants herein")). Plaintiff's Complaint also makes clear that he "brings this action against Defendants under the LMRA, 1947, § 301, for breach of contract by the employer and breach of duty of fair representation by the Union," which he cannot do. (*Id.* ¶ 4.) Therefore, following Third Circuit precedent, this Court must conclude that it lacks subject matter jurisdiction over two of Plaintiff's claims: first, Count one of his Complaint against the City alleging breach of the CBA;[7] and second, Count

[7] Contrary to Plaintiff's novel argument that the defense of lack of subject matter jurisdiction can somehow be waived because the City filed an answer, "it is well-settled that a party can never waive lack of subject matter jurisdiction." *Brown v. Phila. Hous. Auth.*, 350 F.3d 338, 346-47 (citing

two against the Union alleging breach of its duty of fair representation.

Nonetheless, while not entirely evident from Plaintiff's brief, it appears that he requests that this Court exercise supplemental jurisdiction over these claims because the Court has subject matter jurisdiction over the remaining claims against the City.[8] In cases where a District Court has original jurisdiction over some claims, it also has "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a). However, a District Court may decline to exercise supplemental jurisdiction if "the claim raises a novel or complex issue of State law." *Id.* § 1367(c)(1).

On this precise basis, as well as concerns for "judicial economy, convenience, fairness, and comity," several District Courts have declined to exercise supplemental jurisdiction as to a state law duty of fair representation claim against a union.

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numerous cases in support of this proposition). Indeed, while no party has raised the issue of this Court's subject matter jurisdiction over Count one of Plaintiff's Complaint against the City, Fed. R. Civ. P. 12(h)(3) states, "Whenever it appears by suggestion of the parties *or otherwise* that the court lacks jurisdiction of the subject matter, the court *shall* dismiss the action." (emphasis added).

[8] Plaintiff brings Counts three and four against the City pursuant to 42 U.S.C. § 1983, alleging violations of his rights to procedural and substantive due process. The Court has subject matter jurisdiction over these claims under 28 U.S.C. § 1331.

See Rodriguez-Rivera v. City of New York, No. 05 Civ. 10897, 2007 U.S. Dist. LEXIS 19793, at *10-11 (S.D.N.Y. Mar. 12, 2007); *Holt v. Ohio*, No. C2-05-894, 2006 U.S. Dist. LEXIS 69960, at *26-28 (S.D. Ohio Sept. 26, 2006); *Plummer v. Chester Hous. Auth.*, No. 94-4777, 1994 U.S. Dist. LEXIS 17744, at *18-21 (E.D. Pa. Dec. 9, 1994). In light of these cases, and because the duty of fair representation claim is the only Count brought against the Union, the Court declines to exercise supplemental jurisdiction over this claim. In addition, because the duty of fair representation claim and the breach of contract claim against the City are "inextricably interdependent," *Felice*, 985 F.2d at 1226, the Court will not exercise supplemental jurisdiction over Count one against the City.

IV.

For the reasons set forth above, the Court will grant the Union's Motion to Dismiss in Lieu of Answer. The Court will also, *sua sponte*, dismiss Count one of Plaintiff's Complaint against the City. The Court will issue an appropriate Order.

Dated: December 19, 2007

s/ Joseph E. Irenas
JOSEPH E. IRENAS, S.U.S.D.J.